United States Court of Appeals

for the Second Circuit

APPELLANT'S APPENDIX

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United States Court of Appeals

For the Second Circuit.

THE UNITED STATES OF AMERICA,

Appellee,

v.

JAMES McKETHAN,

Defendant-Appellant.

On Appeal From The United States District Court
For The Southern District of New York

Appellant's Appendix

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DOCKET ENTRIES

9-16-74	Filed indictment.
9-19-74	Charles and Anthony Simon (Attys. present) Both defts. plead not guilty. Motions returnable in 10 days. Both defts. continued remanded in lieu of bail fixed by Mag. at $25,000. cash as to each of the defts. McKethan (atty. present) Pleads not guilty. Motions returnable in 10 days. Deft's bail fixed by the court at $10,000. cash or surety plus an additional $15,000. P.R.B. Deft. remanded in lieu of bail.
9-19-74	Stewart-B/W ordered. B/W issued. Werker, J.
9-30-74	D. STEWART-Bench warrant issued.
10-1-74	Filed Affidavit & Notice of Motion by defts C. Simon, A. Simon, and J. McKethan for order directing the U.S. Attorney to serve and file a bill of particulars of the *** etc as indicated rtble before Cannella, J. on 10-10-74.
10-17-74	ANTHONY SIMON) Deft's present, Joseph I. Stone assigned as atty. to A. Simon. CHARLES SIMON) Robert Mitchell assigned as atty to C. Simon. Bail conditions continued.
10-18-74	ALL DEFT'S - Filed papers recv'd from magistrate: Docket sheets, complaint, disposition sheet, notice of appearance & PRB and Surety bond.
10-18-74	Filed notice of readiness for trial.
11-1-74	CHARLES SIMON-Filed deft's financial affidavit.
12-3-74	ANTHONY SIMON-Filed deft's financial affidavit.
12-6-74	CHARLES SIMON-Atty. present. W/D Plea of N.G. and PLEADS GUILTY to Counts 2 and 4. P.S.I. ordered Sent. 1-29-75...Deft Remanded.... Cannella, J. ANTHONY SIMON-Atty. present...Joseph Stone relieved as atty. Court assigned Mr. Thomas Fitzpatrick as atty. Cannella, J.

DOCKET ENTRIES

12-9-74	ANTHONY SIMON-William Madden assigned as atty.....Cannella, J.
12-16-75	A. SIMON-Atty. present. Deft PLEADS GUILTY to 2&3 P.S.I. ordered sent. 1-29-75 Cannella
12-16-74	JAMES McKETHAN-TRIAL begun with a JURY.
12-17-74	TRIAL Cont'd.
12-18-74	TRIAL Cont'd. and concluded..Jury Verdict GUILTY on each of counts 1&2..P.S.I. ordered sentence 1-30-75 9:30 a.m. Present bail conditions cont'd.....Cannella, J.
12-19-74	Filed Govt's memorandum of law.
12-19-74	Filed Govt's request to charge.
1-7-75	A.SIMON-Mailed original CJA Copy 1 to the A.O. Wash. D.C. for payment.. Cannella
1-30-75	ANTHONY SIMON-Filed Judgment (Atty. William Madden present) The deft is committed for imprisonment for a period of SEVEN YEARS, on count 2. Deft is placed on Special Parole for a term of THREE YEARS, to commence upon the expiration of confinement, pursuant to Ti.21, U.S. Code, Sec. 841.. FIVE YEARS on count 3, to run concurrent with sentence imposed on Count 2...Count 1 is dismissed on motion of deft's counsel with the consent of the Govt...CANNELLA, J..... Ent. on 1-31-75
1-30-75	CHARLES SIMON-Filed Judgment (Atty. Robert Mitchell present) The deft is committed for imprisonment for a period of SIX YEARS on count 2. Deft is placed on Special Parole for a period of THREE YEARS, to commence upon expiration of confinement, pursuant to Ti.21, U.S. Code, Sec. 841.. SIX YEARS on count 4, to run concurrent with sentence imposed on count 2, both counts pursuant to Ti.18, U.S. Code, Sec. 4208(a)(1), and the Court designates the minimum term at the expiration of which the deft shall become eligible for parole shall be TWO YEARS... Count 1 is dismissed on motion of deft's counsel with the consent of the Govt..... CANNELLA, J....Ent. on 1-31-75

DOCKET ENTRIES

1-30-75	JAMES McKETHAN-Filed Judgment (Atty. Paul Goldberger present) The deft is committed for imprisonment for a period of THREE YEARS on each of counts 1 and 2 to run concurrent with each other...Deft is placed on Special Parole for a term of THREE YEARS to commence upon the expiration of Confinement, pursuant to Ti.21 United States Code Sec. 841.....Bail pending appeal.....Cannella, J. Ent.1-31-75
1-31-75	DAVID STEWART Closed statiscally because defendant is a fugitive. In all other respects this case is still pending.
2-7-75	JAMES McKETHAN-Filed notice of appeal from judgment of 1-30-75. Copy given to U.S. Atty. and mailed to deft at 229 W. 44th St. NYC.

INDICTMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-v-

ANTHONY SIMON
CHARLES SIMON
JAMES McKETHAN and
David Stewart

Defendants.

The Grand Jury charges:

1. From on or about the 1st day of July, 1974 and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York and elsewhere ANTHONY SIMON, CHARLES SIMON, JAMES McKETHAN and DAVID STEWART the defendants and others to the Grand Jury unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

2. It was part of said conspiracy that the said defendants unlawfully, intentionally and knowingly would distribute and possess with intent to distribute Schedule I narcotic drug controlled substances the exact amount thereof being to the Grand Jury unknown in violation of Sections 812, 841(a)(1) and

841(b)(1)(A) of Title 21, United States Code.

SECOND COUNT

The Grand Jury further charges:

On or about the 4th day of September, 1974 in the Southern District of New York, ANTHONY SIMON, CHARLES SIMON and JAMES McKETHAN the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately one kilogram of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(B).) and Title 18, United States Code, Section 2.

THIRD COUNT

The Grand Jury further charges:

On or about the 4th day of September, 1974, in the Southern District of New York, ANTHONY SIMON, the defendant, did unlawfully, wilfully and knowingly carry a firearm during the commission of a felony for which he could be prosecuted in a Court of the United States to wit, Title 21, United States Code, Section 846.

(Title 18, United States Code, Section 924(c)(2)).

FOURTH COUNT

The Grand Jury further charges:

On or about the 4th day of September, 1974 in the Southern District of New York, CHARLES SIMON, the defendant, did unlawfully, wilfully and knowingly carry a firearm during the commission of a felony for which he could be prosecuted in a Court of the United States; to wit, Title 21, United States Code, Section 846.

(Title 18, United States Code Section 924(c)(2)).

s/ George Angenine
Foreman

s/ Paul J. Curran
PAUL J. CURRAN
United States Attorney

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York and elsewhere:

1. In or about the month of August, 1974 the defendant ANTHONY SIMON had a telephone conversation with an undercover agent of the Drug Enforcement Administration and agreed to sell approximately two ounces of heroin in Boston, Massachusetts.

2. In or about the month of August, 1974 the defendant DAVID STEWART delivered approximately 50 grams of heroin to an undercover agent in Boston, Massachusetts.

3. On or about September 4, 1974 the defendants CHARLES SIMON and JAMES McKETHAN arrived in the vicinity of the Skyline Motor Inn, 50th Street and Tenth Avenue, New York, New York.

4. On or about September 4, 1974 the defendant CHARLES SIMON handed the defendant ANTHONY SIMON a package containing approximately one kilogram of heroin.

(Title 18, United States Code, Section 846).

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UNITED STATES OF AMERICA
vs.
JAMES McKETHAN.

74 Crim. 874

New York, December 18, 1974;
10.25 a.m.

Trial resumed.

- -

(Jury in box.)

C H A R G E

Cannella, J.

Members of the jury:

We have arrived at that stage of the case where it becomes my duty to charge you on the law involved in this particular matter.

At the outset, I agree with the lawyers that you have paid careful attention to this case and that you have followed it. It has not been a long case but you did pay attention, and for that reason I appreciate it and thank you for that.

I want to thank the lawyers too, Mr. Epstein and Mr. Goldberger, because you will agree with me that they are gentlemen to the manor borne though they are opponents in this case. They have conducted themselves well, and I am sure they have assisted you in your search for the truth.

They have also assisted me. We have had some

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conferences at the side bar from time to time, some on your behalf and on my own behalf. I thank them for the service they have been to the Court, particularly since, in a very refreshing manner, they have actually cut away a lot of underbrush and dead wood, and everything else in this case, and directed your attention to the specific area, which is really the critical area of this case, namely, that McKethan knew anything about this at all.

As you reflect on the testimony in the case, it comparatively covers a short span of time starting on August 22nd of 1974 and going on to the 23rd, the 27th and the 28th, whatever those dates were, and then coming down to New York in September, and finally culminating on September 4th of 1974.

I am not going to go into great detail on testimony. The only time I actually will refer to it is to assist you in the way in which you should apply the law to these facts. The lawyers have covered these areas very carefully, and I am sure you remember that. It has not been so long ago.

I think the first impression that comes to your mind as you listen to this is that there were very large areas of agreement here. As a matter of fact, when Mr. Goldberger opened he said, "Look, we know the Simon brothers were in a conspiracy. We know there was a

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narcotics conspiracy. We know that something went on in Boston, that there were a couple of sales up there; we know that there was some activity in New York, and we know that McKetchan was there. He was in front of the place. He was in a car. But he was not involved in the narcotics transaction."

Now the government's position, of course, is that he was, and so although there are large areas of agreement here between the parties, there are areas of disagreement. These are the critical areas in the case, and since these areas give rise to questions of fact, you have been selected because if there were no questions of fact in this case I would decide the whole thing; but since there are questions of fact, you have been carefully selected by the parties. They chose you and they want you to abide by the oath you took, that you were going to try this case on the evidence as you heard it and the law as given to you by the Court, and that's exactly what you are doing now.

In questions of fact you are the sole and sovereign judges. Anything the lawyers have said about the facts, or anything that I say about the facts, doesn't bind you at all. You are also the sovereign judges of the credibility of the witnesses. Whom are you going to believe and what are you going to believe? That is one hundred per cent

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your business. The Court is not concerned with that, nor are the lawyers. You have been selected for that very purpose.

The proposition of law here is very simple: Under our jurisprudence which we, of course, inherited from the British, who, in turn, had a mixed bag as far as the law was concerned, you will recall at one time the Romans came up and conquered England. As a matter of fact, a lot of their cities are named after Latin words. Lancaster is one. In Latin that would mean the Camp of the Lang. There are other words in the English language which are definitely of Latin origin.

The law, to some degree, was affected by it.

In addition to that, there was a time when King William was King of the Norman French and he conquered England; he brought together, over to England, certain Latin expressions which had been Normanized, in effect, so that the English law is a bastard law. Many of the phrases that are in English law are Norman French and Latin at this point. The very name you have as juror is a Norman word which means, "I swear," and here you are swearing to try this case on the law.

Many of the things that happened in the case, if you understand Latin and the Norman French involved,

are very plain. Even these young men here, who are apparently educated people who go and work in a bureau of the government, unfortunately did not take what originally was required of people that went to school; at one time Herbrew was required, Latin was required, and Greek was required in their education. They gradually squeezed out the Hebrew, then the Greek, and then they squeezed out the Latin, so even now I understand Catholic priests don't have to take Latin any more.

It is a shame because you take the question that was asked by Mr. Goldberger and you know what an inculpatory statement was. If they had any education in Latin they would realize that culp is the Latin word for fault, and "inculpatory" is "your fault," and "exculpatory" is "not your fault." So the very definition of the words would give them a clue as to what it was about.

In any event, the proposition of law which arises from this case is this: Under our jurisprudence a man is presumed innocent unless and until his guilt is proven by credible evidence beyond a reasonable doubt. That's the simple proposition of law in this case. The burden of proof never shifts to the defendant.

You will recall when I selected you as jurors I told you the defendant need do nothing. He need not

present any evidence. He need not present any exhibits. He need not take the stand. If he desires to he can. He didn't even have to have his lawyer cross-examine any of these witnesses because the burden of proving his guilt is on the government throughout the case, even now as we talk, and when you go into the juryroom to deliberate. You may not convict this defendant unless you are convinced beyond a reasonable doubt of his guilt as to even one of these two charges.

27 The kind of evidence that is required in the case can be described in a number of ways. The first that I would call your attention to is a definition by way of quality and quantity.

The quality of the evidence must be credible evidence. Here, again, is another Latin word; credere simply means believable. So the evidence was be to you believable evidence.

The quantity of evidence is beyond a reasonable doubt. That is not a very mysterious term. It actually defines itself. A reasonable doubt means a doubt that is based on reason and must be a substantial rather than a speculative doubt. It must be sufficient to cause a reasonably prudent person to hesitate to act in the more important affairs of his life. That's the kind of doubt

we are talking about. Unless you are satisfied to that extent you may not convict the defendant of either of these charges.

Evidence may also be described in the following fashion: testimonial or oral evidence, as we would call it, where a witness comes on the witness stand and tells you what he has learned by the use of his senses, what he has seen, what he has heard, what he has felt. It includes any natural inferences that flow from that, and it also includes anything that is brought out on cross-examination by the other side.

In this particular case all the witnesses were called by the government and, therefore, Mr. Goldberger had a right to just ignore them, do nothing, or he had a right to cross-examine them, and since he did cross-examine them he has a right to demand that you consider that evidence as well as the evidence produced on direct examination by the government, so you consider everything that was said under oath here.

The second kind of evidence is called documentary evidence or exhibits. In this case we have some. We have the substance, which the defendant has conceded is, in fact, a narcotic, namely hereoin, within the purview of the statute. There is no question there. That's

one of the areas that I told you was made easier for you to decide this case. There is a concession here that this is, in fact, a substance which is prohibited by the Federal Narcotics Control Act.

There are other documents. I don't know whether any of them were introduced in evidence.

By the way, if they are not introduced into evidence you may not consider them and you may not speculate upon what is in them. For example, the registration of the New Jersey license, you cannot speculate as to what was in it. You can take into consideration what has been agreed on between the parties as evidence, namely that in that particular document there is a description of that Cadillac which says it is a four-door Cadillac. That is in evidence, but the rest of that document you cannot speculate on. That's true with all that plethora, or whatever you want to call it, of exhibits that were referred to by the parties as hundreds of reports or some such thing. You cannot speculate as to what is in those reports because they are not in evidence and you may not look at them. That's a rule of the game.

In addition thereto, you can take into consideration any stipulations that were entered into between the parties. A "stipulation" is a fancy word for saying

"agreement." These parties have agreed that for the purpose of this trial this is a fact. One of the things they agreed on was that if the chemist were called he would testify that this was heroin that he analyzed, and another thing was that in that particular document which I think was 6 for identification -- I don't know whether that's so or not -- but the Motor Vehicle document, they stipulated in that document it says that this car was a four-door car, and that's a concession in the case.

Evidence in the case also involves what the Court takes judicial notice of. There are things that the Court takes judicial notice of because they are so evident there is no need for proof. One of the things that I take judicial notice of in this case, for example, is that heroin hydrochloride is a controlled drug within Schedule I of the Federal Narcotics Control Act because the chemist has testified that it is heroin hydrochloride and there is a schedule in the Act that says that heroin hydrochloride is a controlled substance; therefore I take judicial notice that that is so.

Another thing I take judicial notice of is the fact that you can hear this case because these events happened within the purview of our jurisdiction. "Diction" means sound. Actually it is an English word. "Jure" means

"law." It means that the Court and you have a right to hear this particular case.

There is another element involved here which is called venue, and venue simply means the place where the action can be brought, and I take judicial notice that it can be brought here, even though some of these occurrences happened in Boston, because the fact of the matter is that under the conspiracy law, or even under substantive law, if a crime is committed partly in one district and partly in another district it can be brought in either district. It is properly brought in this district and you have a right to hear it. I take judicial notice of that.

Another way that evidence can be defined is by what is called direct evidence and circumstantial evidence, and this, by the way, is a very, very important area for you to understand because there are some people that think that the only way a case can be proven is by direct evidence. They don't want to know anything about circumstantial evidence because they want to know what they see, who was there. That is fine and good but that's not the law. It is not common sense and you are not doing it every day in your life. You are living your life to a great degree upon circumstantial evidence. You assume something is going to happen because you know certain things and you know that

certain things usually happen and, therefore, you act on it.

Direct evidence is evidence of a witness who comes and testifies what he knows, like an eye-witness.

Circumstantial evidence is a chain of events from which you can draw a conclusion, and the law does not require proof either by direct or circumstantial evidence but simply says you consider all the evidence in the case, direct evidence, circumstantial evidence, and whatever, and if at the end of that time and after examining that evidence you are convinced of the defendant's guilt beyond a reasonabledoubt, then you may convict him. It makes no distinction between the kinds of evidence. It is important in this case because a lot of the evidence that involves the possibility of this defendant being guilty of this charge is circumstantial evidence, and so I would give you a few examples of this, and then you will remember it later on when I tell you at the end of the case what essentially your chore is.

You know, we learn a lot of things by example. In the bible, for example, most of the teachingis by parable. A great parable that comes to mind is one that Aesop wrote, Aesop's Fables.

For example, he wanted to explain that it is not

right to be greedy. How do you teach somebody it is not right to be greedy? You tell them a story. So the story he told, if you can recall, was about the dog who had a big piece of meat in its mouth. He was walking along in great anticipation of eating this meat. He looked in a pond and actually he saw his reflection. He didn't realize it. He saw there a great piece of meat. So he opened his mouth to pick up the piece of meat that was in the reflection, and he lost the meat and lost his meal. Then Aesop said at the end, "Don't be greedy."

28 If I said to you, "Don't be greedy," would you understand it as well if I said to you, "Remember the dog with the piece of meat in his mouth"?

Circumstantial evidence is explained in a lot of ways by different judges.

The incident that comes to my mind concerning circumstantial evidence goes back to when I was a younger man. I see some of the people are contemporaries with me, and it is history as far as the rest of you are concerned. I see Miss Bannigan laughing. It is history to her.

Joe Louis was a great champion and at one point in time following an incident that disturbed many people, namely the failure of Hitler to acknowledge Jessie Owens in the Olympics, Joe Louis fought Schmelling. Nobody

dreamed for a minute he was going to lose, but he did. So there was a rematch because this just couldn't exist and Joe Louis did fight him again a second time.

There is a man thatwent in to see that fight in Madison Square Garden and he had a ticket right up at ringside. He got there a little late, and when he got there he got there just as the fighters were getting up from their benches to go out into the middle of the ring and meet the referee and start the fight. As he got in to get his seat the people all rose. He was not a great big man and he couldn't see what was going on, so he jumped up on the seat, and as he started to go up on the seat the bell rang for the start of the fight. By the time he got up on top of the seat and was looking over the people to see what was happening, a matter of seconds, he looked and Schmelling was laying on his back and Joe Louis was standing in a neutral corner. He watched while the referee counted to ten. The doctor jumped into the ring and looked at Schmelling, who was unconscious, came to, got up, wobbled over to Louis, patted him on the back, and walked off. The referee lifted up Louis's hand, "The winner and World Champion again," because he had been the World Champion before he lost to Schmelling.

Could that man testify or could he say with any

degree of certainty that Joe Louis had knocked out Schmelling? What point in time could he do it? When he walked into the place he could not do it because the fight had not started. As he walked over into the seat and he started to find his place and he heard the ring of the bell, the fight had just started and he certainly couldn't do it then. He jumped up and looked over the people and he saw Schmeling lying on his back, and he saw Louis in a neutral corner. Could he do it then? Then he saw the doctor go and talk to Schmeling and lift him up, bring him to, and then he saw Schmeling go over to Louis and pat him on the back and walk off. He saw the referee lift his arm up, "The Winner." At what point in time did he have enough circumstantial evidence, enough of a chain of events of evidence to say, "I can say that Louisknocked out Schmeling"?

Suppose for the sake of argument when he first looked and saw Schmeling on the ground and Louis standing up going to the neutral corner, could he say at that point, "Why wasn't it possible that there be some crank up in the fifth row, way up on top of the arena, with a telescopic lens on a gun who shot Schmeling?" "Why wasn't it possible that somebody gave Schmeling some medicine and knocked him out?" "Why wasn't it possible his heart

stopped beating from natural causes at that point in time?" How does he know? He doesn't.

The doctor comes in and he sees the doctor revive him, pick him up, and Schmeling gets up and pats Louis on his back. At that point there he is getting a little more surer because he has a bit more facts.

And then when he sees the referee raise up his hand and declare him the winner, those are all pieces of evidence that give him the ability to make a judgment. That's what circumstantial evidence is like, and that's what it is like in this case.

The government has made certain contentions based on the evidence, and so has the defendant. When we come to the end of the case we will examine them, but I am only supplying to you this area of direct and circumstantial evidence. You will recall it when you go back at the end of the case and determine where the truth lies and whether this man is, in fact, guilty of these charges.

The next area I will talk to you about is what is not evidence, because I have described to you what is evidence in a number of ways. Now I will tell you what is not evidence so you will not consider it and it will not confuse you.

The first thing is the indictment. The indict-

ment is not evidence in this case. It only shows that the grand jury made a charge and at some point in time the defendant pleaded not guilty; therefore, the burden of proof is on the government, and rightly so. That's all it does. You may not consider it as evidence although you will have it before you. Your forelady will have it because she can mark on there how you voted on the 1st count and how you voted on the 2nd count. You may examine it. That's the only purpose, to help you come in and report your verdict.

Questions which were asked for which no answers were given because I sustained objections, they are not evidence because what is evidence in the case is the answer, not the question. The question sometimes assumes facts which have never been proven throughout the whole case. You will be guided by not the question but by the answer in the case.

I already warned you that there are exhibits which are only marked for identification and they are not evidence. You may not consider them.

The next area I will discuss with you is, how do you evaluate the evidence? Or, toput it in a less fancy way, how do you find where the truth lies?

Of course, there are a number of things that juries

have decided in cases a long, long time ago and they have used certain norms. I would call your attention to some of them because they will assist you in coming to where the truth lies in this case.

The first is the demeanorof the witness, how he appears to you on the stand, how he testifies, whether or not his answers conform with the facts in the case which you have already found to be true, whether or not he asked questions in order to bide time. Generally, you use the same fine discernment in evaluating the evidence of the witnesses who appeared as you do in everyday life, in matters of great importance to you. It is elemental and common sense and common sense plays a great part in this and you are to use your native common sense in order to arrive at a verdict in this case. You don't leave it outside of the juryroom. You bring it in with you and exercise it.

The interest of the witness is of importance. In this case all the witnesses were government people. Of course they are working for the government. They don't get paid like ladies get paid in making pocketbooks by the piece. They get paid by the year. They don't get paid by convictions of acquittals, but they are employees of the government and, of course, you will realize that that in and of itself doesn't give them any greater weight nor

lesser weight. They are just the same as any other witness and considering their background and training and interest you will make a determination as to where the truth lies.

29 If any one of these witnesses has falsely testified as to a material fact, you must disregard that portion of the testimony which is false and, as a matter of fact, you may disregard the entire testimony if you so find. I notice there are a number of ladies on the jury. I will explain this rule to you in a fashion which I think you will understand better.

If you make an omelet and you put a rotten egg in the omelet, you are not going to serve any of it to your family. You will throw the whole thing away. On the other hand, if you burn a piece of toast and it is not completely burned, you scrape off the part that is burned and usually the husband will wind up with the other piece and he will eat it. That's the way this rule works here. You can disregard the entire testimony but you must disregard that portion of it which you believe to be false.

The fact thatthis defendant has not taken the stand may not be used against him. You may not draw any presumption of guilt nor any inference of guilt from that fact. He has a legal right and a perfect right to refuse to do that, and that may not enter into your discussions in

arriving at your verdict. There is a claim on the part of the government that when he was questioned in the office at the end of the case they asked him something about the incident and he is supposed to have answered at that time, according to the government witness, "I have no idea what was going on. Charley Simon asked me to go to the Skyline to pick him up at 145th Street and Broadway, and I drove him to the Skyline to pick up his brother"; and when the agent asked him something about the package in the car it was alleged that he said, "Absolutely nothing came out of my trunk. I have no idea."

The government claims that that statement is false because the witnesses have testified that this kilogram of narcotics, that plastic bag wrapped up in that coat, was in the back of the car and they saw the brothers take it out, and the car was McKethan's car: he had the key. One witness at least has said that he saw McKethan hand the key to one of the Simon brothers.

If you find that testimony to be false, namely you find McKethan's statement to be false at the time he made it in the Bureau of Narcotics, then you can consider that with the totality of the rest of the evidence; and if you find that, in fact, it was false and he knew it was false and he made it as a false statement, then you

may consider this as consciousness of guilt on his part, and you may consider that together with the rest of the evidence in coming to a conclusion in this case.

I will now define some of the terms that are in the indictment so that you can understand the charge.

The first one that I see here says that in this case the defendant acted unlawfully, intentionally and knowingly. In the 2nd count that is repeated.

He cannot be guilty of this charge unless he acts in that fashion. This, essentially, involves mental processes. You cannot see them. The best evidence you can get in this area about what a fellow is thinking is where he would say, "I am thinking so-and-so," out loud. Usually that doesn't happen. The way you determine what someone is thinking and what their mental processes are is to examine the facts and then from the results that come and what is done during the course of that, you come to a conclusion as to whether he was thinking about it or not.

The way in which he must be thinking is first unlawfully. That means against the Federal law in this particular case. The federal law that we are talking about is the law that prohibits the distribution and possession with intent to distribute a controlled substance which, in this case, is the narcotic heroin. Of course he must know

the material in the case, from the chemist's testimony which was stipulated, is heroin, a narcotic.

Then he must act intentionally. That means he must act voluntarily, freely, with an understanding of what he is doing, not a mistake or error or in good faith.

And, lastly, he must act knowingly, and that is actually about the same thing. To act knowingly means to know you are doing something freely, that you are not doing it because of good faith or mistake or by inadvertence.

The concept of intentionally, in addition to that knowingly -- I just defined intentionally for you -- adds what the Romans would call a mens rea. "Mens" meaning mind and "rea" meaning evil: evil mind; with a bad motive; with an evil intent. Here, actually, it is with the purpose of violating the Federal Narcotics Control Act.

The next group of words are that they combined, conspired, confederated and agreed -- which is essentially the conspiracy charge. Conspiracy here, again, comes from a Latin word "conspirare" which means to breathe together.

I guess the best example is when the men are watching football on Sunday, and they watch the players huddle up before they go on with the play. They all get

together and whisper. That's the kind of breathing together we are talking about. There is an element of secrecy about it. That is essentially what we mean by a conspiracy.

The law defines a conspiracy as an occasion when two or more persons get together to commit either an illegal act or an unlawful act, or to commit a lawful act by unlawful means and then something is done in furtherance of it. That's the definition of a conspiracy. That's what the defendant is charged with in the 1st count.

The rules involving conspiracy also apply to the 2nd count because in the 2nd count he is charged with two others with distributing or possessing with intent to distribute a quantity of heroin, and when you act in concert or as part of a common plan, the same rules apply to that kind of a case as apply to a conspiracy. I will give you an idea what the law is about conspiracy in a few minutes.

Other terms involved here include the word "distribute." The word "distribute" as used in this statute includes a sale or any transfer of a drug or a controlled substance. That is a distribution. Here it is alleged that there were a number of distributions, sales, and also the last incident, you will recall, although the narcotics were brought to the motel and the money was brought there, there never was any delivery of the money. They arrested him before he got the money and before they delivered the

heroin to the agent.

In that particular case what is really charged is that there was possession with intent to distribute, because it is clear from the facts in the case that if nothing had happened and these really had been dealings in narcotics, they money would have passed and the drugs would have passed in an exchange for the money.

The word "possession" is use in that particular statute. The phrase is "possession with intent to distribute." "Possession" is a word which you have to understand here because the government doesn't claim that they have evidence that Mr. McKethan actually had this kilo of heroin in his hands, but what they are saying is that he had constructive possession.

Constructive possession means the ability to exercise power over an object, exercise dominion and control over it. It is notpredicated on the idea of ownership at all. You don't have to own something to possess it. It does not have to be yours.

30 For example, if you go to the Hertz people and you give them a fee, they will turn over to you a car which they own. Just before they turn it over to you they have possession of it. They are transferring to you the right of possession. They give you a key. When they have that

key and the girl gives you the key, up until the point in time that she gives you the key, if it is a girl that is behind the counter, the company has constructive possession of that car because with that key that employee, or another employee, could go out into the parking lot and put the key in the car and go off. So the company, up to that point, has constructive possession of the car. When they give you the key and you have the key and you are starting to walk out of the door, you have constructive possession because you can go to the car and put the key in the car and ride off. You don't have actual possession yet because you have not reached the car, but as you get into the car and you put the key into the car you now have actual possession of the car.

If you go home and you go inside and your wife says, "Can I use the car to go down to the store?" and you say, "Fine, here's the key," as soon as she gets the key she has constructive possession of the car, and when she goes out and uses it she has actual possession. If both the husband and wife go out, they have joint possession. It is possible for two people to possess something.

So these elements of possession are in this case. The narcotics were in the trunk of the car. There is no testimony as to how it got there. We don't

know. But we do know it was McKethan's car, and we do know he had the key, and we do know the agents say they saw the brothers take the narcotics out of the car, and it is for you to make a judgment as to whether in that point in time McKethan had constructive possession of that substance which was in his car and whether he knew about it. This you will have to determine from the entire evidence in the case when you get down to this particular area.

What is the law as far as conspiracy is concerned? That's the 1st count. Conspiracy, as I have said to you on more than one occasion, is an agreement between two or more persons to commit an illegal act or to commit a legal act by illegal means. It involves an agreement to violate the law. It is not necessary that the persons charged meet together and enter into a formal agreement or that they state in words or writing what the scheme is or how it was to be effected. It is sufficient to show that they tacitly came to a mutual understanding to accomplish the unlawful act. Such an agreement may be inferred from the circumstances and the conduct of the parties since ordinarily a conspiracy is characterized by secrecy.

In determining whether a conspiracy existed, it is your obligation to consider the actions and declarations of all the alleged participants, and this also applies to

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whether or not the defendant is a party to this conspiracy. You must examine all the facts and circumstances in the case.

The defendant may not be bound by the acts or declarations of others until it is established that the conspiracy existed and that he was one of its members.

To be a member of the conspiracy, the defendant need not know all the other members, nor need he know all the details of the conspiracy, nor the means by which the conspiracy was to be accomplished. Each member of the conspiracy may perform separate and distinct acts. It is necessary, however, that the government prove beyond a reasonable doubt that the defendant was aware of the common purpose and was a willing participant in it with the intent to advance the purpose of the conspiracy.

One who intentionally and knowingly joins an existing conspiracy is charged with the same responsibility as if he had been one of the instigators of the conspiracy.

The extent of the defendant's participation is not determinative of his guilt or innocence. A defendant may be convicted as a conspirator even though he plays a minor part in the conspiracy.

If it is established beyond a reasonable doubt

to your satisfaction that a conspiracy existed and that the defendant was one of its members, then the acts and declarations of the other parties of the conspiracy in or out of the defendant's presence, which are done in furtherance of the objects of the conspiracy and during its existence, may be considered as evidence against the defendant because when a person enters into an agreement for an illegal purpose each of them becomes an agent for the other.

However, any statements of any conspirators which are not in furtherance of the conspiracy or which are made before its existence or after its termination may be considered as evidence only as against the person making them.

In a conspiracy charge it is not necessary that all the overt acts which are charged in the conspiracy, in the indictment, are performed. One overt act is sufficient. An overt act means any act committed by one or more of the conspirators to accomplish the purpose of the conspiracy. It need not be in violation of the law and the other conspirators need not join in it or even know about it.

You will recall the example I gave you as to the two men who were going to rob a bank. One man went to get the flashlight. That was a perfectly legal act but still

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it would satisfy the element of an overt act in the case of a conspiracy to rob the bank.

It is necessary only that the act be done in furtherance of the purpose or object of the conspiracy.

Mere presence at the scene of a crime and knowledge that a crime was being committed is not sufficient to establish that a defendant aided and abetted the crime unless you find beyond a reasonable doubt that the defendant was a participant and not merely a knowing spectator. It is claimed in this case that if the defendant, McKethan, was a party to it, at least he was not a principal; the government contends he was a principal because he aided and abetted the Simon brothers in this enterprise.

"To aid and abet" is described in the law and spelled out in the statute in the following fashion: Whoever aids, abets, counsels, commands, induces, or procures the commission of a crime is punishable as a principal.

In order to aid or abet the commission of a crime a person must associate himself with the criminal venture, participate in it, and try to make it successful.

In a case where there are two or more persons charged with the commission of a crime, and in this case as to both of these counts there is more than one person

charged -- there is only one person being tried by you but the others are also charged -- the guilt of one defendant may be established without proof that all the defendants perpetrated every act in the offense charged. However, you are to consider his case separately from the other fellows and give a separate consideration to each charge that is in the indictment so that you will make such a determination based upon an examination of the entire evidence in the case as you recall it.

That, generally, is the law as it applies to conspiracy, and we will now get to the indictment itself, which I will give to your forelady when you go in there.

31 The first thing I will call your attention to is this: The narcotic laws that are involved in this case are very simple. I will read them to you because they are very short.

The first law you are concerned with is Title 21, Section 841. That says this:

"It shall be unlawful for any person knowingly or intentionally to distribute, or possess with intent to distribute, a controlled substance."

That's it.

Then there is Section 846, which is part of the same Title which says:

"If people conspire to violate that law they have committed another crime."

That's as simple as that.

The last law that is involved in this case is what I just read to you about aiding and abetting. That's part of Title 18, Section 2. I have described to you what that is. Simply: Whoever commits an offense against the United States or effects, aids, abets, counsels, or commands, induces, or procures its commission, commits a crime. Then he becomes a principal.

That's the simple law involved in this case, and that's what the indictment is predicated upon.

Here's the way you analyze the indictment:

You start in at the beginning, "The Grand Jury charges: ***"

That's fine, but it is only an accusation. That doesn't help you one way or the other.

Then it says: On or about the 1st day of July, 1974, until the filing of the indictment, which was on September 16th, 1974. That doesn't mean to say the government has to prove that this particular conspiracy existed during that whole time. They don't charge that at all. The evidence doesn't charge that. It must be within those two dates. The two dates are July 1st and

September 16th. If you will remember, the evidence in this case starts August 22nd and ends September 4th, so it is clearly within those two dates.

It speaks of "in the Southern District of New York." I take judicial notice that the area concerning the New York areas that are involved here are within the Southern District of New York. Of course the areas in the Boston area are in another area, but since part of it is here we have jurisdiction here, as I explained to you before.

Then it says, "Anthony Simon, Charles Simon, James McKethan, and David Stewart, the defendants, and others to the Grand Jury unknown, unlawfully, intentionally, and knowingly." Here you have to find that that's the way this defendant acted. He had to act unlawfully, intentionally and knowingly. I have already described and defined those words for you. Very simply put: against the Federal Narcotics Control Law voluntarily and freely, not in good faith, not by inadvertence, not by mistake, but with evil intent, a bad motive. That's the way he would have to act in order for you to find him guilty of this charge. You would have to find that beyond a reasonable doubt.

Then the next is: "Knowingly combined, con-

spired, confederated, and agreed *** to violate" that section of the law I just told you about.

So the question is: Was there a conspiracy here? I have defined what a conspiracy is to you. I have told you the rules concerning it. You will make a determination as to whether or not there was a conspiracy and whether or not this defendant was a part of it, and whether the overt act was committed which includes the conspiracy charge.

The second paragrpah of this first charge simply indicates the means by which the conspiracy was to be accomplished and here the means are two: distribution of a drug; possession with intent to distribute.

You will recall the previous incidents. There were two sales that were consummated, according to the evidence. That would be one of the means. The last one was the incident on September 4th. If you find it did happen beyond a reasonable doubt, that would be the other means.

The government doesn't have to prove all the means. One means is sufficient. So that in that particular area you have those two charges, and if you find both of them, then, of course, the government has proven an excess amount. The government need only prove one of them.

Then it has four overt acts, and if you recall I told you you must be satisfied beyond a reasonable doubt as to at least one of them. I am not going to read all of them. I will read one of them and indicate to you that, for example, if you did find even that one alone, or any other one alone, beyond a reasonable doubt, then that would be sufficient for this indictment. The one I refer to is No. 3, which says: "On or about September 4th, 1974, the defendants Charles Simon and James McKethan arrived in the vicinity of the Skyline Motor Inn, 15th Street and Tenth Avenue, New York, New York."

If you will recall, Mr. Goldberger says he was there. He does not dispute it. So that is one act that I have indicated to you. There are three others, and you will examine them, and if you find that the government has proven any one of them, that will be sufficient for the purposes of the conspiracy.

If you find the government has proven these elements by credible evidence beyond a reasonable doubt, then it is your obligation to convict this defendant. On the other hand, if the government has failed to prove any one or more of these elements involved in this 1st count, then it is your obligation to acquit them.

You would then go on to the 2nd count, which is

a very short count, and I will read it to you.

The charge is that on or about the 4th day of September, 1974 -- and that doesn't have to be exactly the 4th day, but there has been no dispute that this happened on the 4th day of September -- you will have to make such a finding in order to convict under this charge -- in the Southern District of New York -- and here, again, the Skyline Motel, I take judicial notice that that is located in Manhattan and that is within the Southern District of New York -- the defendants Anthony Simon, Charles Simon and James McKethan, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately 1 kilogram of heroin.

That's the charge.

"To distribute" I told you, of course, means to trade, to turn over, to sell. All those things are included in the concept of "distribute" under the statute.

32 "To possess" I have already explained to you. There is no charge here that the government has proven that McKethan actually possessed it, but what they are saying is that he had constructive possession.

They are not claiming here there was a distribution, essentially because the drug was never delivered and

they never delivered the money. They seized it.

So the most that could happen here was that they possessed it with an intent to distribute, and that McKethan aided and abetted them in this venture. If he did, then, of course, he would be guilty as a principal though he didn't commit the actual act of bringing the narcotics up to the room. If he aided and abetted, then he would be equally guilty with the others.

I am taking judicial notice that the narcotic drug heroin is a controlled substance within the purview of this act.

So if you find those elements by credible evidence beyond a reasonable doubt, then it is your obligation to convict the defendant. On the other hand, if the government has failed to prove any one or more or all of these elements, then it is your obligation to acquit the defendant.

We go down to the end of the case now. What is the nub of the case and what do the two parties contend?

I am not going to go through every contention because you listened to the contentions. They both made them very vivid to you, and it has not been so long in point of time.

I have put down a few that I remember. They are not all the contentions. Because I would have to repeat

everything they said.

The government contends that the informant or somebody said that when Simon comes he is going to come with another man.

When the arrest took place Greenan said that the defendant did certain things, took hold of the steering wheel, bent down his head, shaking, and by the time he got up he said, "Hell, who are you? Man, you ain't got nothing on me. Where is the stuff?"

I call your attention to the fact that this gold on white, or white on gold, 1972 Cadillac, was McKethan's car.

I call your attention to the fact that he gave the key, according to one witness, to the brothers whowent back and out of the trunk of the car appeared the narcotics. How that got in there, there is no evidence. It was McKethan's car.

That's, in very broad strokes, the government's position.

The defendant says, "Look, I pleaded not guilty in this case. I have a presumption of innocence. My guilt must be proven beyond a reasonable doubt, and the government has not done it. How can you believe a witness like Greenan who doesn't even know that the car he was

following for an hour and a half has four doors on it? Nobody else heard this man say anything like that. McKethan was never in Boston when the other two sales took place. His name was never mentioned in Boston. Nobody says he was there. Even in New York his name doesn't appear in the reports. He knows nothing about this, just as he told the agents."

There is more to the contentions of both parties, but that, in broad strokes, is what the contentions are, as I see them, and so, where are you?

You are back with the little fellow up in Madison Square Garden who was trying to figure out when can he say Louis won the fight? You will have to consider every little piece of evidence.

This is not one of Aesop's Fables, but let me tell you about the Roman father who on the point of death called his sons and said, "I am going to die now. I am going to leave you this piece of land." Then he wanted to make a moral, like Aesop did, and he said, "I want you to watch this. Give me one twig that is over there near the fire." He took the twig and he broke it easily.

Then he said, "You see, I did that very easily. Now give me two twigs." And the two twigs he broke easily though he was in extremis.

He finally got up to a point where he could not break them. There were too many. The strength of each individual twig which was frail in itself, together were sufficient to prevent him from breaking them. He said his point in telling his sons this was to make sure that they stuck together. "By doing this, nobody can take you over, rip you off," or whatever expression you want to use.

My point is that circumstantial evidence is like that. If you come to a point where the twigs are so numerous and are of such a quantity and quality that they satisfy you beyond a reasonable doubt, then circumstantial evidence together with whatever evidence there is in the case has proven the case. If you don't get to that point, it has not.

Essentially, what you are going to do is use your common sense. Talk over the case amongst yourselves. Come up with a verdict that is in accord with your conscience. At that point in time you will report the verdict.

Sympathy and bias play no part in this case whatsoever.

We are not in a forum where we are going to ask people,or anything like that. What we are asking for is to recollect on a statement you made on your oath, that you are going to decide this case on the evidence, not on sympathy

or bias but the evidence and the law.

Punishment does not enter into your consideration whatsoever because that's the function of the Court. You do not ever send anyone to jail; it is not your function. If we ever get to that point it becomes the job of the judge to do and not your job. That can't help you in finding the facts.

If there comes a point in time when you can't remember something that was said or there is a difference between you and you cannot come to a conclusion, the reporter has taken this all down, and he will be glad to read you that portion of the testimony which will help you. However, when you do that we would like you to put down the name of the witness, the part of the testimony that you want to have read, and namely whether it is on direct examination or cross-examination, as best as you can, to help us, to help the reporter find the place in the record.

I have one last time to talk to the lawyers. You will have to excuse me. I will do that now and then the case will be turned over to you for your judgment.

The verdict must be unanimous. All 12 jurors must agree.

(At the side bar.)

MR. GOLDBERGER: Just two, I think, Judge.

When you were giving one of your examples you said, "We do know he had the key. We do know that McKethan had the key to the ignition because he was driving the car." There is an issue as to whether he had the key to the trunk.

(In open court.)

THE COURT: When I said something about the key, I am only referring to the testimony in the case. Of course it is up to you to either accept or reject that, and the question is what kind of a key it was, whether it was the key to the trunk. All those questions are for you to decide in deciding the evidence in the case.

(At the side bar.)

MR. GOLDBERGER: In your discussion of the law of conspiracy -- I am not sure -- it is my belief that the Court should have explained that while the acts and declarations of others may be attributed to the defendant, the jury must first find that the defendant through his own acts and own declarations was a member of the conspiracy.

THE COURT: You have an exception.

MR. EPSTEIN: In summarizing Mr. Goldberger's contentions you said Mr. Goldberger contends that Mr. McKethan's name does not appear in the reports. I think he contended Mr. McKethan's name was not mentioned by

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Anthony Simon. His name does appear in the reports.

MR. GOLDBERGER: There are reports it appears in. I was referring, basically --

THE COURT: I think they know the area I was talking about, and that was the area where there was cross-examination, examination on both sides, so I will leave that as it is.

Is there anything else?

MR. GOLDBERGER: No, your Honor.

MR. EPSTEIN: No, your Honor.

THE COURT: By the way, can we send the exhibits in? The drugs we won't send in, but what about the exhibits? There are hardly any exhibits.

(In open court.)

THE COURT: There are not really any exhibits that can help you. The only thing that was marked into evidence was the raincoat. A raincoat is a raincoat. If you want to see it, well and good. The other things are tapes that were played. Since there is no dispute about that area, although it was marked into evidence, I do not see that it has any bearing for you at this point. Other than that, we will swear in the marshals.

First I want to excuse the alternate jurors.

(Alternate jurors excused.)

STATE OF NEW YORK)
: SS.
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 24 day of March, 1975 deponent served the within appendix upon N.L. Attorneys

attonrye(s) for appellee

in this action, at Foley Sq
New York, N.Y.

the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

.....
ROBERT BAILEY

Sworn to before me, this
24 day of March, 1975.

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1976